# Supreme Court of the United States

No. 72-1193

American Pipe and Construction Co., et al.,

Petitioners,

v.

Utah, et al.

ORDER ALLOWING CERTIORARI. Filed May 7 ----------, 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------Circuit is granted.

IN THE

# Supreme Court of the United States

October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, a corporation,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.


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IN THE

# Supreme Court of the United States

October Term, 1972

No. .....

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

*Petitioners,*

*vs.*

STATE OF UTAH, a body politic, *et al.*,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioners, American Pipe and Construction Co., Smith-Scott, Inc., United Concrete Pipe Company, Kaiser Steel Corporation, United States Steel Corporation, U.S. Industries, Inc., Utah Concrete Pipe Company and W. R. White Company, defendants below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (sometimes hereinafter referred to as the "Ninth Circuit") entered in this case on January 31, 1973 (Appendix A hereto), reversing the order of the United States District Court for the Central District of California, which denied the motion of the Respondents to intervene in the action.

## Opinions Below.

The Opinion of the District Court, dated December 17, 1969, denying class action status to the instant action, is reported at 49 F.R.D. 17 (C.D. Calif. 1969) (Appendix B hereto). The Opinion of the District Court, dated March 30, 1970, denying the motions of Respondents to intervene, is reported at 50 F.R.D. 99 (C.D. Calif. 1970) (Appendix C hereto). The Opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported (Appendix D hereto).

## Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of the United States Court of Appeals for the Ninth Circuit in this case was first filed and entered December 11, 1972 (Appendix E hereto). Thereafter, a petition for rehearing was filed on December 22, 1972. On January 31, 1973, the opinion and judgment dated December 11, 1972, were withdrawn, the opinion and judgment dated January 31, 1973, were entered and the petition for rehearing was denied (Appendices D and A respectively, hereto). This petition for *certiorari* is being filed within ninety (90) days of the aforesaid date of January 31, 1973.

## Questions Presented.

1. Whether the United States Court of Appeals may, without a showing of abuse of discretion by the District Court, abrogate Rule 24(b), F.R.C.P., by overruling a discretionary order of the District Court made pursuant to Rule 24(b) denying motions to intervene

which were not timely and which prejudiced the rights of the original parties to the action.

2. What is the proper role of the United States Court of Appeals in reviewing a decision by a District Court made under Rule 24(b), F.R.C.P.

3. Whether the filing of an invalid class action abrogates the substantive barring provisions of Section 5(b) of the Clayton Act by tolling the statute of limitations as to members of the "non-class" in contravention of the congressional intent in enacting the statute and of the plain language thereof.

**Statutes, Federal Rules and Regulations Involved.**

1. *United States Code*, Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731);

2. *United States Code*, Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282);

3. *United States Code*, Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283);

4. *United States Code*, Title 15, Section 16b (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283);

5. Rule 3, Federal Rules of Civil Procedure;

6. Rule 23(a), (b) and (c) Federal Rules of Civil Procedure; and

7. Rule 24(b), Federal Rules of Civil Procedure. (See Appendix F hereto).

**Statement of the Case.**

On May 13, 1969, the State of Utah filed a class action complaint against Petitioners [defendants below] in the United States District Court for the District of Utah, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages for purchases of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of the state and local government in the State of Utah who are end users of pipe acquired from defendants, co-conspirators and others"[1] and "all other states in the Western Area, . . . which have not previously filed a similar action."[2] At the time Utah filed its class action complaint, however, only six or seven members of the purported class "had ever discussed with Utah's attorney the possibility of a pipe antitrust suit against . . . [Petitioners]."[3]

Utah's complaint alleged a price-fixing conspiracy among Petitioners continuing until the date of the filing of the complaint.[4] In fact, the present action is an extremely tardy tag-end appendage to and relies upon the same conspiracies alleged in the litigation popularly known as the "West Coast Pipe Cases" in which Respondents had every opportunity to join. Such cases were in litigation for more than 4 years and were widely publicized. By reason thereof, Respondents are charged with notice of their pendency. The tardy character of the motions to intervene is underscored by the history of this West Coast Pipe litigation. Such cases,

[1]R. 317-318 [Ex. G].

[2]R. 317-318, 320-321 [Ex. G].

[3]R. 448 [Ex. N]; *State of Utah v. American Pipe and Construction Company*, 50 F.R.D. 99, 101 (C.D. Calif. 1970).

[4]R. 327 [Ex. G].

more than 100 in number with approximately 350 claimants, included five class actions, and were pending between 1964 and 1968 in the various District Courts of the Ninth Circuit. The actions were consolidated for discovery under the Honorable Martin Pence, Chief Judge for the District of Hawaii. In such consolidated actions, Judge Pence entered an order that prospective interveners in the various class actions must file by March 31, 1966.[5]

Respondent's counsel could have sued on behalf of any respondent desiring to sue prior to the running of the statute of limitations. The Trial Court specifically noted that the plaintiff's attorneys in this case and the Attorney General in the State of Utah had been studying the purported cause of action as early as October 1968, some six months before the statute of limitations ran, and more than one year prior to December 29, 1969, when the motions to intervene at issue herein were filed.[6]

The West Coast Pipe Cases grew out of five Government criminal actions initiated in March 1964 and terminated on June 19, 1964.[7] These actions were followed by five Government civil actions filed under the False Claims Act[8] on June 23, 1964. Thereafter, the

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[5]R. 492 [Ex. Q].

[6]R. 351-52 [Ex. J].

[7]Under the literal language thereof, the barring provisions of Section 5(b) of the Clayton Act should have been triggered by such termination of the Government criminal actions, since 5(b) provides:

> "That *whenever* the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, *any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.*" (Emphasis added).

[8]15 U.S.C. 15(a).

Government civil actions were amended on October 28, 1964, to add a claim for injunctive relief under Section 4 of the Clayton Act.[9] The purpose of this amendment by the Government was to add a claim capable of tolling the statute of limitations (Section 5(b) of the Clayton Act)[10] as to private claims. On December 8, 1967, all defendants except American Pipe and Construction Company entered into a consent decree in the Government civil actions,[11] which in light of decisions from the Ninth Circuit and other jurisdictions would have caused the statute of limitations to run one year thereafter.[12] On May 24, 1968, the actions against American were also terminated.[13]

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[9]15 U.S.C. 15.

[10]15 U.S.C. 16(a).

[11]R. 229-284 [Ex. E].

[12]*See, Manny v. Warner Bros. Pictures,* 116 F.Supp. 807, 809-10 (S.D. Cal. 1953); *Century Hardware Corp. v. Powernail Co.,* 282 F.Supp. 223, 228-29 (E.D. Wis. 1968); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.,* 193 F.Supp. 401, 403-05 (S.D. N.Y. 1961); *Grengs v. Twentieth Century-Fox Film Corp.,* 232 F.2d 325, 333 (7th Cir. 1956), *cert. denied,* 352 U.S. 871 (1956); *Tague v. Balaban,* 146 F.Supp. 356, 361 (N.D. Ill. 1956); and *Sun Theatre Corp. v. RKO Radio Pictures,* 213 F.2d 284, 292 (7th Cir. 1954).

[13]American was not a party to two of the Government civil actions—those involving steel large and small diameter pressure pipe. Accordingly, those two actions were terminated for all purposes with respect to all defendants on December 8, 1967, and the statute of limitations with respect to claims relating to those types of pipe ran long before the State of Utah filed its complaint herein. This same point was argued to the United States Court of Appeals for the Ninth Circuit, in a parallel case, *Maricopa County v. American Pipe & Construction Co., et al.,* 303 F.Supp. 77 (D. Ariz. 1969). It refused to pass on the point, holding that it had not been raised below, but reserved to appellants therein the right to assert the point before the District Court. [Unreported Decision No. 24,737, 9th Cir., August 28, 1970]. In the instant case, the same point was argued to the District Court. [R. 559-564, Ex. U]. It did not pass on the point because it decided on broader grounds the issues involved in this appeal.

Prior to the events which gave rise to the instant appeal, Judge Pence held, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F. Supp. 77 (D. Ariz. 1969) that the statute of limitations as to private claims arising out of the Western Pipe conspiracy was tolled throughout both the Government criminal actions and the Government civil actions and remained tolled as to each co-conspirator until *May 24, 1969*, one year following the termination of the Government civil actions as to the last defendant, American. The effect of such decision was to abrogate the last defendant rule which had previously been enunciated by a district court in the Ninth Circuit.[14] By virtue of that decision, the statute of limitations as to private claims arising out of the Western Pipe conspiracy was greatly lengthened, and Utah was permitted to file its complaint on *May 13, 1969*, more than six years after the termination of the conspiracy complained of and only eleven days prior to the date on which the statute of limitations ran. During those eleven days, none of the members of the purported class alleged by Utah filed any actions or motions or in any way made their presence known to the District Court.

On August 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the instant case from the District Court of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407.[15] On December 4, 1969, Judge Pence, pursuant to Petition-

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[14]*Manny v. Warner Bros. Pictures, supra.*

[15]*In re West of the Rockies Concrete Pipe Antitrust Cases*, 303 F.Supp. 507, 508 (J.P.M.L. 1969).

ers' motion dated November 14, 1969, entered an order that the instant case should ". . . not be maintained as a class action and, no parties having joined therein, the class action, . . . in all respects stands terminated as of May 13, 1969, the date of the filing of the Complaint herein."[16] That order was based on the finding that "Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, having heretofore commenced actions on their own behalf. . . . The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impractical," and "[a] class action has heretofore shown to be inferior to other available methods for the fair and efficient adjudication of the instant controversy."[17] Such findings were made in light of the series of class actions included in the West Coast Pipe Cases in which various plaintiffs purported to represent all potential claimants, including the Respondents herein.

At the time of Judge Pence's decision respecting the class action, none of the members of the purported class had evidenced any interest in Utah's suit. Subsequent to that decision and as a result of solicitation by Utah, some seventy-odd towns, cities and other government entities [hereinafter referred to as Respondents] moved to intervene as plaintiffs in this action pursuant to either Rule 24(a)(2) or Rule 24(b)(2) of the Federal Rules of Civil Procedure. Petitioners opposed such intervention, and, following a hearing, the District Court on March 30, 1970, denied the alterna-

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[16]R. 347 [Ex. I].
[17]R. 346-347 [Ex. I].

tive motions. It specifically found that Respondents were not entitled to intervene as a matter of right pursuant to Rule 24(a)(2) because they had no legitimate interest in the outcome of Utah's action.[18] It refused to grant permissive intervention pursuant to Rule 24(b)(2) on two grounds: first, because ". . . to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's cases,"[19] and, second, because any attempt to avoid the bar of Section 5(b) of the Clayton Act by means of the Federal Rules of Civil Procedure would unlawfully abridge substantive rights of antitrust defendants.[20] It did, however, indicate that neither ground would apply to the assertion of claims arising during the four-year period preceding the filing of the

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[18]R. 450; 50 F.R.D. at 102.

[19]R. 451; 50 F.R.D. at 102.

[20]R. 460; 50 F.R.D. at 108.

Previously, in its Findings of Fact respecting the class action, the Trial Court made the following findings:

> "1. Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, have heretofore commenced actions on their own behalf. Between August 1964 and April 1966, over 100 separate actions allegedly arising out of this same 'Western Pipe Conspiracy' were filed in eight different United States District Courts of the Ninth Circuit. In three actions members of an alleged class in those actions purported to represent the same broad class of 'public end-users' which plaintiffs herein claim to represent, and in another action, the State of California claimed to represent all of the public end-users within said State. *All the aforesaid actions and resulting settlements were widely publicized and potential plaintiffs, throughout the 'Western area,' should have had notice thereof prior to the termination, during 1967, 1968 and 1969, of said actions.* [R. 346-347] (Emphasis added).

motions to intervene and that intervention would be granted for the limited purpose of asserting such claims.[21]

In exercising its discretion under Rule 24(b), the Trial Court made Findings of Fact as follows:

> "1. All governmental bodies in the alleged 'class' who may feel themselves injured by any alleged 'Western Pipe' conspirators had over five years from at least March 10, 1964, to May 23, 1969, to seek redress, jointly or severally. Each has at all times been represented by counsel. . . ."[22]
>
> "3. . . . [T]here is insufficient showing by any of the aforesaid petitioners that they properly relied upon the purported class action brought by the State of Utah; and the Court, therefore, finds that none of such parties did in fact rely upon such action as a class action."[23]
>
> "4. The granting of any of the aforesaid motions to intervene or to amend the Complaint would violate the rights of defendants to fairness and due process."[24]
>
> "6. *There never was a class within the meaning of Rule 23, F.R.C.P. as alleged in the Complaint herein, and the members of the purported 'class' described herein cannot claim that they started their suits, vicariously, before the tolling period expired.*"[25] (Emphasis added.)

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[21]R. 449; 50 F.R.D. at 101, n. 2.
[22]R. 444 [Ex. M].
[23]R. 444 [Ex. M].
[24]R. 444 [Ex. M].
[25]R. 445 [Ex. M].

In order to secure a final appealable order [and, no doubt, in heed of the District Court's advice that pursuit of post-1962 claims would be an expensive and fruitless venture], Respondents amended their proposed complaint in intervention so as to eliminate any claim as to the four-year period preceding December 12, 1969. Thereupon, Respondents took an appeal from the denial of their motions to intervene.

On December 11, 1972, the Ninth Circuit, by a divided court, reversed the decision of Judge Martin Pence denying intervention and apparently bottomed such decision upon the factual predicate that "the record persuasively indicates forbearance [to sue in reliance upon the class action] of appellants." In a Petition for Rehearing, Petitioners pointed out that the foregoing factual predicate of the Court of Appeals was in error and unsupported by the record. Thereafter, on January 31, 1973, the earlier opinion of the Ninth Circuit was withdrawn and, by a divided court, the Ninth Circuit eliminated any requirement of reliance by the purported class members. In its judgment entered January 31, 1973, the Ninth Circuit affirmed the order of the District Court denying intervention by Respondents pursuant to Rule 24(a), F.R.C.P., and reversed the order of the District Court denying intervention pursuant to Rule 24(b), F.R.C.P.

The effect of the Ninth Circuit's decision both is to repeal by judicial mandate Rule 24(b), F.R.C.P., and the barring provisions of Section 5(b) of the Clayton Act. In ruling that intervention should have been granted pursuant to Rule 24(b), the Ninth Circuit held that the filing of a class action, even an invalid one, tolls the running of Section 5(b) as to members of the "non-

class" despite the fact that such members did not rely upon the filing of the class action to protect their interests and were unaware of the very existence of the class action. Although the decision of the Ninth Circuit upheld the District Court's denial of intervention as a matter of right pursuant to Rule 24(a), the practical effect of the Ninth Circuit's decision is to render intervention under Rule 24(b) mandatory rather than discretionary. The crux of such decision is that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to intervene if the class is found not to be properly constituted under Rule 23 and the alleged class members would otherwise be bound by the statute of limitations from filing suit.

Moreover, the Ninth Circuit chose to ignore altogether the discretionary portion of the District Court's ruling, wherein it denied permissive intervention because of the prejudice to Respondents that would result.[36]

The decision below is so at odds with the principles established by this Court, and establishes so erroneous a precedent for the district courts of the Ninth Circuit to follow, that it requires correction. Heretofore there has been no question under Rule 24(b), F.R.C.P., that discretionary decisions of district courts could be overruled only upon a clear showing of abuse of discretion.

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[36]R. 451 [Ex. N].

## REASONS FOR GRANTING THE WRIT.

### I.

### The Decision Below Reversing a Discretionary Ruling of the District Court Was Not Based on a Showing of Abuse of Discretion and Is, Therefore, in Conflict With the Decisions of This Court and With Other Circuits as Well as the Plain Language of Rule 24(b), F.R.C.P.

#### A. The Decision of the Court of Appeals Constitutes Judicial Abrogation of Rule 24(b).

Rule 24(b) of the Federal Rules of Civil Procedure provides in relevant part "In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In reaching its decision to deny intervention by Respondents, the District Court held ". . . to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case."[37] Such discretionary ruling was based upon all the files and records of this case and was also made in light of the history of the West Coast Pipe Cases, over which Judge Martin Pence presided, in which various plaintiffs purported to represent all potential claimants, including Respondents.

In its opinion of January 31, 1973, the Court of Appeals held:

> "The order of the District Court is affirmed as to intervention under Rule 24(a). As to inter-

[37] R. 451 [Ex. N].

> vention under Rule 24(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions." (Court's Opinion, p. 5, lines 20-24, Appendix D).

The decision of the Ninth Circuit is based upon the incorrect assumption that the Trial Court denied intervention solely on the basis of the statute of limitations. The Ninth Circuit simply ignored the discretionary portion of the Trial Court's decision. Such discretionary decision should be given the greatest latitude by an appellate court because the Trial Court's vast experience in the West Coast Pipe Cases makes it uniquely qualified to weigh all the factors pertinent to intervention.

By ignoring the discretionary portion of the District Court's ruling and reversing that ruling on the statute of limitations issue alone, the Ninth Circuit contradicted a long line of Supreme Court decisions including *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 91 L.ed. 1646 (1947)[28] and decisions of the Sixth, Eighth and Tenth Circuits[29] that have held that discretionary decisions of the District Courts are to be reversed *only* upon a clear showing of abuse of discretion. No such showing was even undertaken by the Ninth Circuit in the action. Thus,

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[28]*See also, Allen Calculators, Inc. v. National Cash Reg. Co.*, 322 U.S. 137, 142 (1943).

[29]*See, FMC Corporation v. Keizer Equipment Company*, 433 F.2d 654, 656 (6th Cir. 1970); *Bumgarner v. Ute Tribe of Uintah and Ouray Res.*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Edmondson v. State of Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967); and *Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962).

the decision below is so at odds with the principles established by this Court and followed by other Circuits that it requires correction.

**B. The Decision of the Majority in the Ninth Circuit Established an Unprecedented and Unsupported Standard Which Must Be Followed by All District Courts in Exercising Their Discretion Under Rule 24(b), F.R.C.P.**

The standard substituted by the Ninth Circuit for the discretion given to the courts under Rule 24(b) is that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to intervene if the class is found not to be properly constituted under Rule 23 and if the alleged members of the class would otherwise be precluded from filing suit by the statute of limitations. Thus, although the Ninth Circuit pays lip service to approving and affirming the decision of the lower court that the appellants were not entitled to intervention as a matter of right under Rule 24(a), the decision converts all 24(b) discretionary interventions into mandatory intervention as of right if the statute of limitations has run against purported class members. This constitutes a judicial repeal of Section 24(b), F.R.C.P., as it relates to purported class members.

**C. The Ninth Circuit's Decision Contravenes the Mandate of Rule 24 That the Trial Court Shall Consider Whether Intervention Will Prejudice the Original Parties.**

Rule 24(b), F.R.C.P., mandates that the district court, in exercising its discretion thereunder: ". . . shall consider whether the intervention will unduly delay or

prejudice the adjudication of the rights of the original parties."[30] The Ninth Circuit paid no heed to the Trial Court's finding that intervention would seriously prejudice the original parties. Prejudice to the defendants is underscored by the history of the West Coast Pipe Cases. After widespread publicity and requests for intervention, a settlement was made upon the payment of more than $21,000,000 to approximately 350 claimants. United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta paid approximately $4,000,000 more than their pro rata share of the settlement. Such double payment by the defendants would not have been made but for the understanding of defendants that all claims arising from the alleged conspiracy were settled [R. 490, *et seq.*]. Thus, the Trial Court arrived at the inevitable conclusion that to allow intervention of litigants who slept on their rights for five years would unduly prejudice the rights of defendants herein. The Ninth Circuit's decision in favor of such dilatory litigants is in disregard of the clear mandate of Rule 24(b) against intervention that will prejudice the rights of the original parties. Moreover, this clearly erroneous standard for District Courts to follow needs correction and the proper role of the Court of Appeals must be defined so that it does not substitute its judgment for the discretion of the Trial Court.

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[30]*See, Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962).

## II.

**This Case Presents Important Questions Regarding the Effect of the Filing of Class Actions on Statutes of Limitation, Particularly Section 5(b) of the Clayton Act, Which Questions Have Not Been Settled by This Court but Should Be. Decisions of Courts in Other Circuits Show the Need for Definitive Clarification.**

The decision of the United States Court of Appeals for the Ninth Circuit is unique. This Court has never held that the filing of an invalid class action tolls any statute of limitation including the statute applicable to private antitrust damage actions (Section 5(b) of the Clayton Act, which is hereinafter referred to as "Section 5(b)"). Moreover, no other court has indicated even by way of dictum that an invalid class action tolls or should toll the statute of limitations with respect to claims of individuals who have not relied upon the filing of the class action to protect their rights and who are not even aware of the existence of the class action. The unprecedented decision of the Ninth Circuit, if left undisturbed, would not only contravene the congressional intent underlying Section 5(b) of the Clayton Act but would make the time period of every statute of limitation open-ended with no discernable period of repose.

By the simple expedient of alleging the existence of a class, a plaintiff can, under the Ninth Circuit's decision, toll the statute of limitations governing claims of would-be class members for such period of time as is required for the District Court to determine that the action cannot be maintained as a class action. Upon a determination by the District Court that there is not a proper class action, members of the non-class are free

to bring separate actions of their own or to move to intervene in the original action. Assuming, for example, that the applicable statute of limitations would have run one month after the filing of the class action, under the Ninth Circuit's decision, the would-be class members of the non-class have a month following the final negative determination regarding the class action in which to file their complaints or motions, even though a year or more may have passed since the original complaint was filed.

In five published opinions, the lower courts have previously considered the question of whether or not the filing of an invalid class action tolls the statute of limitations for claims of would-be class members.

*See, Abercrombie v. Lum's, Inc.*, 345 F.Supp. 387, 394 (S.D. Fla. 1972);

[In denying a class action, the court pointed out by way of dictum (345 F.Supp. 394, n. 13): "The statute of limitations would be no bar to those franchisees who could show that they in fact relied on the pendency of this case as a class action. Buford v. American Finance Co., 333 F.Supp. 1243 (N.D.Ga. 1971); *see* Ratner v. Chemical Bank, *supra* at 1017, n. 4; Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-461 (E.D.Pa. 1968). As to any others, Rule 23 obviously was not designated to revive stale claims."]

*Buford v. American Finance Co.*, 333 F.Supp. 1243, 1252 (N.D. Ga. 1971);

[In denying the class action the court stated (333 F.Supp. 1251): ". . . the plain truth

is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."].

*Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 414 (S.D. N.Y. 1972); [Although it cut off the rights of class members against whom the statute of limitations had run, the court denied a class action and pointed out (54 F.R.D. 414):

"(5) No other member of the proposed class has evinced an interest in the lawsuit or brought a similar suit elsewhere, and the one-year limitation period in 15 U.S.C. § 1640 (e) has long since expired."

This affords a striking parallel to this action. In the instant suit, interveners evinced no interest in this action prior to the time they were solicited to sue by counsel for the State of Utah.]

*Rogers v. Coburn Finance Corp. of DeKalb*, 54 F.R.D. 417, 419 (N.D. Ga. 1972);

[In refusing to vacate a prior order terminating the class action, the court stated (54 F.R.D. 419): ". . . as this court pointed out in *Buford*, the members of the class plaintiff seeks to represent may still bring their own individual actions and may move this court to toll the applicable one-year statute of limitations period upon a showing that they purposely refrained from filing their own actions within the time limit in reliance upon the maintenance of a class action in the instant case."]

*Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

[The court held that the action "may be maintained as a class action" on behalf of certain classes of plaintiffs. In its opinion, the court stated as follows, 43 F.R.D. 460-61: "Where the class action determination is affirmative, the court is merely declaring that the action may be 'maintained' as a class action, and it seems reasonably clear that this determination relates back to the date of filing of the complaint. (For this reason, I reject the defendants' contention that an affirmative determination in these cases would constitute an invalid enlargement of the statute of limitations). But where the determination is negative, and a class action is, in the words of the Committee, 'stripped of its character as a class action' (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members."]

At most, the distillate of the foregoing decisions is that the claims of would-be members may not be barred by the statute of limitations if such class members can establish that they relied upon the class action to protect their claims. The decision of the Ninth Circuit herein is the only one to date that holds that reliance is immaterial and the statute of limitations is tolled as to all claims. Such decision clearly creates a conflict between the Circuits. Inasmuch as the Court has never

made a definitive ruling under Rule 23 as to the effect of the filing of a class action, whether valid or invalid, on the tolling of the statute of limitations as to purported class members and inasmuch as the conflict created between the Circuits will introduce confusion into the administration of the innumerable class actions pending throughout the federal judicial system, it is both appropriate and exceedingly important that the Court resolve the matter.

The decision below will also have a great effect in the enforcement of various substantive federal statutes. Extension of the limitations' periods created by Congress will interfere with the congressional purposes that led to the adoption of such statutes. In the enforcement of antitrust laws such is clearly the case. In adopting Section 5(b) Congress clearly stated its intent to eliminate the various tolling exceptions that had unduly prolonged the statute of limitations governing antitrust actions. House Report Number 422 sets forth the type of situation that Section 5(b) would eliminate:

> "In the private treble damage action of *Christensen v. Paramount Pictures,* the court held that the period of limitations had been tolled with respect to the action in question for a period of 12 years by virtue of the wartime tolling statute and the pendency of a Government antitrust suit. *The extent to which the litigation in this case was extended by virtue of various tolling provisions of Federal Law is disclosed by the following table, indicating the inadvisability of prolonging the limitation period in such instances.*
>
> "*While the committee considers it highly desirable to toll the statute of limitations during a*

> *Government antitrust action and to grant plaintiffs a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust laws.* The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, *he would be required to bring his action* either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued."[31]

The decision of the Ninth Circuit is in square contradiction to the foregoing statute of repose since it eliminates the requirement that the litigant "*bring his action either (a) within the suspension period, i.e.,* within 1 year after the Government suit had terminated or (b) within 4 years after his cause of action accrued." Similarly, Congress saw fit to limit private claims for violations of the securities laws to a one-year period.[32] A variety of other federal statutes of limitation are also within the ambit of each of the rulings of the Ninth Circuit at issue herein. (Examples thereof [twenty-six in number] are set forth in Appendix G hereto.) The policy

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[31]H. R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2. (1955 (Emphasis added)).

[32]15 U.S.C. §§ 77m, 77www, 78i and 78r.

underlying such statute would clearly be thwarted by the tolling exception created by the Ninth Circuit in the instant action. As a result of the decision herein, the Ninth Circuit has engrafted yet another judicially created exception onto the various statutes of limitation that have been established by Congress. Furthermore, it has ignored altogether the well-established principle that rules of procedure such as Rule 23 cannot be employed to abridge or enlarge substantive rights.[83] Indeed, the Ninth Circuit has itself held in other cases that "the right to bar an action for lapse of time is a substantive right."[84] It follows that the decision of the Ninth Circuit at issue herein is in direct contradiction with the principles enunciated by this Court:[85]

> ". . . The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The decision of the Ninth Circuit in this action is not only unprecedented and in contravention of clearly

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[83] *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 460 (E.D. Pa. 1968).

[84] *John E. King v. Alaska Steamship Co.*, 431 F.2d 994, 996 (9th Cir. 1970).

[85] *The Harrisburg*, 119 U.S. 199, 214 (1886), *rev'd on other grounds, Moragne v. States Marine Line*, 398 U.S. 375, 26 L.ed.2d 339, 361, 90 S.Ct. 1772 (1970).

expressed congressional intent, it also lacks altogether any supporting legal rationale. In cases where a would-be class member has relied upon the class action to protect his claims, certain of the lower court cases have considered the class action and statute of limitations question and have refused to adopt the reliance rationale.[36] Other cases have considered such issue and have adopted such reliance rationale[37] Assuming *arguendo* that it is equitable to grant such relying class members the benefit of the filing date of the class action, there is no rationale to support the decision of the Ninth Circuit. Would-be class members who did not rely on the filing of the class action to protect their claims, who were not even aware of its existence, should not be granted the benefit of the filing date of the class action. Such a rule will not promote fairness. A person who has slept on his rights beyond the period of limitations set by Congress no longer has an enforceable claim. It is not the province of the courts to enlarge that period of limitation or revive such claims. The decision below certainly will not promote the efficient administration of justice. Quite the contrary, it will encourage the solicitation of claims by plaintiffs who file class actions. It will compound the problem of client solicitation which has caused the Federal Courts to enter orders in class action cases prohibiting either party from contacting any of the purported class members. Indeed, a proposed form of such court order is contained in the Manual for Complex and Multidistrict Litigation (§§ 1.61 & 1.62) which is distributed to all of the Federal District Courts. The decision below will exacer-

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[36]*Ratner v. Chemical Bank New York Trust Company*, 54 F.R.D. 412, 414 (S.D. N.Y. 1972).

[37]*Philadelphia Electric Co. v. Anaconda Am. Brass Co.*, *supra*.

bate the problem of over use and abuse of the class action device. The decision below encourages the filing of invalid as well as valid class actions. It enables the filing plaintiff to solicit would-be class members for many months until a negative class action decision is reached. Then, he is able to bring motions to intervene on behalf of those he has solicited. In this case, the so-called "interveners" did not initiate intervention but were solicited to intervene by counsel for the State of Utah.

An examination of the exact reasoning by which the Ninth Circuit reached its decision below reveals not only the patent error of such reasoning but the importance of eliminating the decision as a precedent. The Ninth Circuit's reasoning can be summarized as follows:

> Rule 3 of the Federal Rules of Civil Procedure provides that "A civil matter is commenced by filing a complaint with the court". Utah filed a timely suit. If the action had proceeded as a class action, the great weight of authority even under old rule 23 would hold that members of the class could assert their claims without having filed prior to the running of the statute of limitations. Inasmuch as class members who do not participate in the action are now bound by the judgment therein under the current Rule 23, they should be allowed to intervene without satisfying the statute of limitations when class action status is denied.

Such reasoning does not follow. Rule 3 of the Federal Rules may provide that the filing of a complaint commences a civil action, but it does not indicate on behalf of whom the civil action is commenced—the filing party alone or others. Decisions of the lower courts

under old Rule 23 with respect to valid class actions are clearly inapplicable to invalid class actions under present Rule 23. Moreover, this Court has never ruled as to the validity of lower court decisions under Rule 23 which have allowed class members in a properly filed class action to assert claims without independently satisfying the statute of limitations. More important, however, the final step in the Ninth Circuit's reasoning is a total *non-sequitur*. The fact that under present Rule 23 non-participating class members are bound by the judgment in an action has no bearing upon any statute of limitations issue. It is certainly not unfair to bar a would-be class member from asserting claims that are barred by the statute of limitations. He is simply not prejudiced; he has no enforceable claim.

**Conclusion.**

This Court has never decided or given guidance on the effect of Rule 23 on the provisions of Section 5(b) and other statutes of limitation. The instant case presents a unique and compelling opportunity to do so inasmuch as the Ninth Circuit has reached a decision on the matter that is in conflict with the decisions in other Circuits, that will elongate substantially all federal statutes of limitation, that is clearly incorrect and is designed to serve no beneficial end. The decision below, if left undisturbed, would interject confusion into the administration of class actions and promote the solicitation and prosecution of questionable claims. In addition, the decision below clearly fails to adhere to the long established abuse of discretion standard and should be reversed for that reason alone. . . .

In the interests of justice and the effective administration of the federal judicial system, particularly with respect to class actions, this Court should grant *certiorari* in order to rectify the errors below.

Respectfully submitted,

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## APPENDIX "A."

### Order.

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge

Petition for rehearing is denied.

The opinion of this court heretofore filed herein December 11, 1972, is withdrawn. In lieu thereof the opinion filed this day will be substituted.

## APPENDIX "B".

### Decision on Defendants' Motion Opposing Class Action.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, v. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. No. 69-1964.

United States District Court C.D. California, Dec. 17, 1969.

PENCE, District Judge.

On May 13, 1969, the State of Utah filed this "western pipe" Sherman § 1 antitrust action against certain concrete and steel pipe manufacturing companies, seeking treble damages and injunctive relief on its own behalf and in addition, claimed to represent a class described as (1) "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from the defendants, co-conspirators and others"[1] and (2) those states in the Western Area which have not previously filed a similar action.[2]

Defendants have moved for an order that the action not be maintained as a class action.

Plaintiff denominated "those states in the Western Area" as being the states of "Wyoming, Nevada and Idaho", and includes along with them the public bodies and agencies of the states and local governments in

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[1]Complaint, para. 1, pp. 1-2.
[2]Complaint, para. 2, p. 2.

those several states and Utah who are end users of pipe acquired from the defendants, etc. Appended to plaintiff's memorandum in support of its class action allegations is a list of what this court can only determine to be every incorporated whistle-stop, hamlet, village, town, city, county, and water and sewer improvement district in Utah, Nevada, Wyoming and Idaho. The several collections of whistle-stops, etc., total some 300 for Utah, 240 for Idaho, 270 for Wyoming, and 31 for Nevada.[8] Plaintiff did not represent that each was actually an end user of pipe—plaintiff just made a list.

As indicated in the chronological history of the western pipe cases set forth in this court's decision of August 1, 1969, in Maricopa County v. American Pipe and Construction Co. et al., 303 F.Supp. 77 (D.Ariz. 1969), the government's criminal complaint against some of the defendants named in the instant action was filed on March 10, 1964, and on June 23, 1964, the government's civil actions were started.

As this court held in *Maricopa,* the government's criminal and civil actions tolled the statute of limitations until May 24, 1969. Beginning in August 1964, Clayton § 4 treble damage antitrust actions were thereafter filed by the states of Hawaii, California, Oregon, Washington and Arizona against American Pipe and Construction Company, United Concrete Pipe Corp., U.S. Steel, Kaiser Steel, Smith-Scott Inc., and U.S. Industries, all defendants herein, as well as other defendants, charging exactly the same general antitrust

[8]The Nevada list includes the City of Las Vegas, which on January 9, 1968, filed its own private western pipe antitrust civil action in No. 1107-LV, District of Nevada, against American Pipe and Construction Company, Martin-Marietta Corp., and United Concrete Pipe Co., and concluded the same by way of settlement on November 20, 1968.

conspiracies, etc., as set forth in the *Utah* complaint. In each of the complaints of the states of Hawaii, California, Oregon and Washington, and of the United States, as well as in three other of the 100 separate end user actions filed "in the Western Area", these actions were denominated "class actions" under the old (pre 1966) Rule 23. F.R.Civ.P. This court, treating them as spurious class actions, permitted intervention by all aggrieved public bodies of those several states and gave ample time for joinder. The sum total of the actual parties joining in the class actions, in those four states, plus the state and other public bodies in Arizona, as well as the City of Las Vegas, Nevada, and other private end user actions, totaled some 350 plaintiffs. All of the parties involved in the "class actions" have settled their claims and the actions have been dismissed. The United States Government has also settled its end user claims arising out of the "western pipe" conspiracy, as have all other but some one-half dozen late, late filing individual claimants.

Massive discovery, with depositions in depth of the knowledgeable employees of the major conspirators, together with centralized deposit of thousands of documents relative to the underlying alleged conspiracy, is long since ended. The publicity regarding the suits—covering interim rulings by this court over the past five years, published in CCH Trade Regulation Reports, BNA Law Week, and West's Federal Supplement, together with newspaper publicity anent filing of suits and settlement sums received by public bodies, has been spread throughout the western states during the past five years.

The court will take judicial notice that in November of 1968 at the conference of the National Association

of State Purchasing Agents, held in Honolulu, representatives of the State Purchasing Agents of Nevada and Utah were present when this judge delivered an address covering in depth some of the problems of antitrust litigation in the western pipe cases. This court will also take judicial notice that Lewis Markus, Chief, Economic Section, Antitrust Division, United States Department of Justice, has been, as he himself admits, "somewhat of a fixture on the program of each of the Association's annual meetings since about 1961," and has reported to the state purchasing agents on problems of identical bidding and significant antitrust cases brought in each preceding year. The court will also take judicial notice that there is a National Association of Attorneys General which holds annual conventions. The court will also take judicial notice that each of the public bodies who joined in the western pipe litigation actions above indicated, had its own private attorney, although the litigation was headed up in almost every instance through the states' attorneys general. In those cases, as in this, in most instances, private antitrust counsel was employed to assist the states.[4]

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[4]The instant problem was argued on December 1, 1969. On that morning, an Assistant Attorney General for the State of Idaho filed an affidavit (its first and only) in support of the class action, in which the following appears:

"The Attorney General of the State of Idaho has heretofore relied exclusively upon Special Assistant Attorneys General appointed from private law firms to represent the state in antitrust matters. Prior to May 13, 1969, the Special Assistant Attorney General informed ROBERT M. ROBSON that the State of Idaho did not sustain sufficient damage as a result of the alleged violations in the above entitled matter to warrant the expense involved in instituting an independent action on behalf of the State of Idaho. Relying upon this advice, the Idaho Attorney General did not file a complaint against the above named Defendants.

"Information subsequently came to the attention of the Idaho Attorney General that * * * Utah had filed * * * suit * * *."

It is with the above background that the court here approaches the threshold problem facing every court in all Rule 23(b) (3), F.R.Civ.P., problems, viz.: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." F.R. Civ.P., Rule 23(c) (1).

The complaint, on its face (even though its allegations but narrowly escape violating the minimum requirements of Rule 23(b), in that it barely goes beyond repetition of the language of the Rule, (see Gillibeau v. City of Richmond et al., Ninth Circuit, 417 F.2d 426 (1969)), when considered with the list of some 800 inferentially potential plaintiffs referred to above, would appear, superficially, to meet the first prerequisite under Rule 23(a), viz., that the class is so numerous that joinder of all members is impracticable—but more of that hereafter. The allegations that there are questions of law and fact common to the claims, likewise would appear to have some merit in that as this court would judicially notice, from its five-year experience dealing with this same western pipe problem, some threads of a common "western pipe" conspiracy involving some of the here named defendants have been found in each of the states and localities involved in the actions heretofore filed. Also the court would notice that the parties involved in the alleged conspiracy shifted from not only state to state but locality to locality, as did the effect of the conspiratorial acts upon prices. The court notes, for example, that the Utah Concrete Pipe Company and the W. R. White Company, defendants herein, have never been named in any other complaint heretofore filed in the western pipe end user cases and that in their moving

papers in the instant class action problem they allege that they have not operated outside of the state of Utah. An inference to be drawn from the above, of course, would be that other parties defendants might well have to be joined in the other three states affected by the alleged class action. Even if this occurred, however, the court would recognize that there would probably be questions of law and fact common to the "class" claims insofar as the underlying alleged conspiracy of the defendants named herein other than White and Utah Concrete. Thus, on its face, the complaint would apparently meet the second prerequisite of Rule 23(a).

Moreover, the claims of the state of Utah for injury and damages resulting from the alleged conspiracy would probably be generally typical of the claims of the states of Idaho, Wyoming and Nevada, but this court's past experience in the "western pipe" cases has shown that the percentage of artificial price increase, resulting from absence of meaningful competition and stemming from the alleged conspiracy, has varied from locality to locality, not only between states but between localities within the several states. While this might nevertheless meet the prerequisites of Rule 23(a) (3), it would create a question as to whether or not the representative party could adequately protect the interests of the several members of the class. This inner conflict was heretofore illustrated by the difference between Washington Public Power Supply System claims, as contrasted with those of the State of Washington,[5] wherein the State of Washington settled

[5]Washington Public Power Supply System v. American Pipe and Construction Co. et al., Civil No. 6568, W.D.Wash.; State of Washington et al. v. American Pipe and Construction Co. et al., Civil No. 3157, W.D.Wash. [280 F.Supp. 802].

out and the Washington Public Power went to trial on its separate and independent theory of damages. But perhaps this too might not be fatal to the plaintiffs' class action.

What *is* fatal to plaintiffs' class action allegations are the raw facts of the past five years litigation on almost precisely the same facts and problems of law set forth in plaintiffs' complaint, and this prior litigation is a criteria which this court must consider in resolving the "threshold problem." Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2 Cir., 1968).

At the time the various "class actions" were heretofore filed in the various states, as previously indicated they were "spurious class actions", thereby necessitating joinder. Suit and complaint notice was given to public bodies throughout the states of Hawaii, California, Oregon and Washington by the several attorneys general to all potential plaintiffs in those several states. The end result of such notices was that thereafter there was a joinder of all public bodies which had claims against the several "western pipe" defendants. This court had no difficulty whatsoever in handling the conjoined problems of members of the so-called classes.

Therefore, although here plaintiffs have alleged that the class is so numerous that joinder of all the 800 listed potential members is impracticable, this court cannot accept that numerical list as in any way truly representative of the number of public bodies in the

several states who were actually affected by the alleged conspiracy—nor is it so alleged. Based upon population and population expansion in those states over the past twenty years, the court could take judicial notice that the number of end users in Hawaii, Arizona, California, Washington and Oregon should at least be more than seven times as many as the total number of end users in the four states named in the present "class." In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy could not possibly exceed the 350 cases heretofore filed by end users in the other states of the "Western Area." From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful.[9] To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b) (3).

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[9]Notes of the Advisory Committee, 39 F.R.D. 73,102-103 (1966).

The court therefore finds that the first prerequisites to a class action have not and cannot here be met. Defendants' motion that this action not be maintained as a class action is GRANTED.

This court cannot pass by, without commenting thereon, the statement of Gerald R. Miller, counsel for plaintiffs, set forth in his affidavit in support of class action, page 2:

> "*If they had thought the law to be otherwise, the Attorney General in his official capacity would certainly have urged each of these governmental entities to file an individual action.* It was determined, however, that such a procedure would do little more than complicate this action with a multitude of individual plaintiffs, each seeking a similar relief based upon a common violation of the law." (Emphasis added.)

The court notes from plaintiff's affidavits that the Attorney General of the State of Utah and Attorney Miller sometime in October 1968—over six months before the statute of limitations ran—started a study of the western pipe conspiracy. Any detailed study of the litigation then and theretofore pending in the western pipe cases would have disclosed the facts which this court has above recited. A study of the law on the application of a class action to pipe cases as reflected in City of New York v. International Pipe & Ceramics Corp. (44 F.R.D. 584, S.D.N.Y., April 16, 1968) reported in Trade Regulation Reports shortly thereafter, and in Federal Rules Decisions in November 1968, should also have raised a caveat in Utah's determination of the law which might be applied to the present litigation. It should have been unquestioned on the part of the

plaintiff's attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them.

Plaintiffs' attention is also called to Dolgow v. Anderson, 43 F.R.D. 472, 484 E.D.N.Y. January 3, 1968 (Weinstein, J.): Alternative devices of "joinder, intervention, consolidation, and the test case"—"presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through identical suits or individual decisions about joinder or intervention' [quoting from Frankel in 32 Antitrust L.J. 295, 298 (1966)]." The court feels sure that plaintiffs' counsel would agree that his client, as well as most, if not all, members of the so-called class would properly fall into the group described by Judges Weinstein and Frankel.

## APPENDIX "C".

### Decision on Motions to Intervene, Amend, Etc.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, v. American Pipe and Construction Company, United Concrete Pipe Corporation, Utah Concrete Pipe Company, W. R. White Company, United States Steel Corporation, Kaiser Steel Corporation, Smith-Scott, Inc., U.S. Industries, Inc., Defendants. Civ. No. 69-1964-MP.

United States District Court, C. D. California. March 30, 1970.

PENCE, Chief Judge.

The motions before this court are but sequelae of this court's decision and order of December 17, 1969, 49 F.R.D. 17, that this Sherman 1 antitrust case, filed as a class action by the State of Utah under Rule 23(b)(3), F.R.Civ.P., was not to be so maintained. As indicated in that prior ruling, Utah filed this Sherman 1 antitrust suit on May 13, 1969, just eleven days before the statute of limitations in these "Western Pipe" cases ceased to be tolled under Clayton 5(b) (15 U.S.C. § 16(b)). In those eleven days none of the moving parties now before this court filed any actions or motions, nor did any do so until after this court's December 4, 1969 decision. Now, after solicitation to do so by the State of Utah, some 60-odd towns and cities, and water and sewer districts in Utah (petitioners), through Utah's counsel, have: (1) moved, pursuant to Rule 24(a)(2) or in the alternative to Rule 24(b)(2), F.R.Civ.P., to intervene as plaintiffs in the Utah action; and as an alternative, (2) Utah has moved for leave to amend its complaint by adding these petitioners as parties-plaintiff;

(3) as an alternative to that, Utah has moved that the court alter or amend its order of December 4, 1969, pursuant to Rule 23(c) (1), F.R.Civ.P., so as to reinstate this as a class action as to those same petitioners. (4) As yet another alternative, Utah has moved the court for an order directing that notice be given to all members of the class alleged in plaintiff's original complaint advising them of the decision of the court to terminate the class action and then giving them a reasonable time in which to intervene in the present action. Coupled with this is the supplemental motion that the court's order of December 4 be vacated pending such notice and intervention "within a reasonable time" thereafter. (5) Utah also in the alternative moves that the court amend its prior order by adding "the magic language" from 28 U.S.C. § 1292(b) so as to facilitate an interlocutory appeal from its December 4 decision.

The affidavits of the petitioners indicate that in February of 1969 attorneys for only six or seven thereof had ever discussed with Utah's attorney the possibility of a pipe antitrust suit against the defendants herein, or had relied upon the Utah class action to protect their interests.[1] Each of the petitioners alleges that the alleged conspiracy has continued to the date of the filing of the complaint by the State of Utah. All motions have been fully briefed and argued.

While Utah and petitioners allege that the "Western Pipe" conspiracy has continued on until May 13, 1969,

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[1]These include the Metropolitan Water District of Salt Lake City, Salt Lake City, Salt Lake County Sanitary District, Salt Lake City Suburban Sanitary District, Central Weber Sewer Improvement District, City of Ogden, and Bona Vista, claiming that they have purchased some $5 million of pipe from the defendants or others during the period 1946-1964. Discovery in prior pipe litigation indicates that the relevant damage period for the alleged conspiracy was between 1954 and the end of 1962.

the problem underlying all of the motions is that of the bar of the statute of limitations to the petitioners' complaints. Underlying every motion is the desire of the petitioners to avoid that bar by any procedural route. As determined by this court in Maricopa County v. American Pipe and Construction Co. et al., 303 F. Supp. 77 (D.Ariz.1969), the tolling of the statute of limitations on the government's "Western Pipe" conspiracy cases ceased on May 24, 1969. Since only the State of Utah, of all the parties now before this court, filed its suit prior to that date, unless by one means or another the present parties can somehow get under the now dropped portcullis and inside the golden castle of the Clayton Act, any Sherman 1 claims for any injuries prior to the four years preceding the filing of these motions are barred.[2]

*Motions to Intervene Under Rule 24.*

Each of the petitioners urged that they should be permitted to intervene as a matter of right under Rule 24(a) (2), maintaining that they have such an interest relating to the conspiracy charged in the Utah action that the disposition of that action may impair or impede their ability to protect that interest. They urge

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[2]Anent the above, although petitioners have pled that the conspiracy continued on until May 13, 1969, not even Utah seems to take that portion of its complaint seriously. For all antitrust (money) purposes, the only evidence so far developed in the massive prior litigation involving the same alleged conspiracies indicate with almost absolute certainty that any such conspiracies terminated at least by the end of 1962. Digging into all Sherman 1 claims for the four years immediately prior to May 13, 1969 would, therefore, to an equally almost absolute certainty, produce nothing but a dry and expensive hole for the petitioners, with no monetary recovery whatsoever. (The court here is not prejudging; it is prognosticating.) While the court cannot foreclose the petitioners from the questionable pleasure of digging such a hole, it will here bypass that segment of petitioners' allegations.

the court should adopt the "liberalized" interpretation given this section by Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); Smuck v. Hobson, 132 U.S. App.D.C. 372, 408 F.2d 175 (1969); and Nuesse v. Camp, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967). While the advisory committee to the 1966 amendment in its note to subdivision (a) stated: "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene * * *,[3] this court feels that Rule 24(a) (2) has been given its optimum application in *Cascade*. In *Cascade*, *Smuck* and *Nuesse*, each of the intervenors were attempting to implement important and well-defined public policies—a status not enjoyed by petitioners here.

It is only in those cases where the prospective intervenor appears to have a sufficient stake in the outcome and enough to contribute to the resolution of the controversy, that a right to intervene arises. Utah and petitioners admit that a judgment for or against Utah would in nowise preclude the petitioners or any of them from filing independent actions against the same defendants based upon the same alleged conspiratorial acts as set up by Utah. No decision in Utah's case would be res adjudicata as to any portion of their several causes of action. Thus, not one of the petitioners here has any real stake in the outcome of the Utah case, per se. Nor would their presence contribute to the resolution of Utah's claims. As indicated above, it is manifest that the underlying reason for the petitions to intervene is the desire of petitioners to get their

[3]3B Moore's Federal Practice ¶ 24.01 [10].

complaints related back to May 13, 1969, and thereby circumvent the bar of the statute of limitations.

The petitioners here manifestly have no such interest in the outcome of Utah's litigation as would mandate this court to permit them to intervene under Rule 24 (a) (2).

The alternative, permissive intervention under Rule 24(b) (2), is not as easy of resolution. Petitioners' claims might well have questions of fact in common with Utah's—apparently the same parties-defendant, same alleged conspiracy, same time-damage periods, etc. It is manifest, however, that to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case.

The seven petitioners[4] who in their bare bones affidavits indicate some reliance on Utah's class action to toll the statute for them, find some support in dicta in Judge Fullam's excellently written decision in *Philadelphia Electric*,[5] viz., that those members of the non-class who relied upon the class action to protect their interests should be allowed to intervene and their actions relate back to the date the class action was filed, even though, meanwhile, the statute had run. It appears to this court, however, that within the limited context of violations of the antitrust laws, there is a very serious doubt as to the validity of any such holding on intervention in class actions as found in *Philadelphia Electric*

[4]See n. 1.

[5]Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

or *Nisley*[6] under either Rule 23 or Rule 24. This doubt stems from 28 U.S.C. § 2072, the statute enabling the Supreme Court to make the present Rules of Civil Procedure. "Such rules shall not abridge, enlarge or modify any substantive rights * * *".

The courts that have permitted tolling of the statute by the filing of class actions in antitrust actions have consciously or otherwise entered into an "interest-balancing" approach to the problem.[7] Judge Frank, who in York v. Guaranty Trust Co.[8] said that "to hold that such noteholders [who were justified in believing that the plaintiffs' class action was begun on their behalf] cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule [Old Rule 23 (a) (3)] into a trap", was but balancing off the interests of the parties. This same interest-balancing approach was considered by Judge Friendly in his concurring opinion in Escott v. Barchris Constr. Corp.,[9] in commenting on Judge Frank's "trap" argument in connection with an old spurious class action. The courts which have allowed class actions under the New Rule 23 to toll the statute in antitrust suits, likewise have taken an interest-balancing approach,[10] justifying the tolling in order to implement the congressional intent that the language of Clayton 5(b) must be given its broadest application in favor of enabling private

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[6]Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1961), appeal dismissed sub nom., Wade v. Union Carbide, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962).

[7]See 13 Villanova L.R. 370, 382.

[8]143 F.2d 503, 529 (2 Cir. 1944).

[9]340 F.2d 731, 735 (2 Cir. 1965).

[10]This same approach was also adopted by the majority under the old rule in *Union Carbide*, n. 6, 300 F.2d at 590.

litigants to reap every benefit that they possibly can in order to encourage the enforcement of antitrust laws by private litigation,[11] and in spite of verbal recognition of the substantive nature of the statute of limitations under §§ 4B and 5(b)[12] nevertheless have determined that when there is a conflict between implementing the Rules and implementing the antitrust statute of limitations policy balancing demands that the antitrust statute of repose must be violently disturbed by continued tolling—tolling solely authorized by judicial interpretation of Rule 23. This court is not satisfied that such interpretation is permissible under 28 U.S.C. § 2072.

In enacting the antitrust laws, Congress created a novel statutory right on behalf of plaintiffs, tortious and penal in nature, but stemming from no common law right, and providing that those injured by violations of these strictly American theory-of-economics statutes may recover treble damages plus cost of suit, and a reasonable attorney's fee. 15 U.S.C. § 15. Moreover, Congress has specially set up a four year statute of limitations for such antitrust actions, § 4B, and added

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[11] *Maricopa, supra,* 303 F.Supp. at 85. *Cf.* also; *Philadelphia Electric,* n. 5, 43 F.R.D. at 460, and State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 574 (D.C.Minn. 1968).

[12] *Philadelphia Electric,* n. 5, 43 F.R.D. at 460:

> "Surely, it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right', 28 U.S.C. § 2072. The strong presumption of validity of these rules, Hanna v. Plumer, 380 U.S. 460, 461, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), requires this court to apply the rule as written * * *."

on to that statute an additional period during which the statute is tolled by the institution of a civil or criminal proceeding by the United States to prevent, restrain or punish violations of any of the antitrust laws. There is even further tolling because the courts have held[13] that as to 15 U.S.C. § 15b, the rule that fraudulent concealment tolls a statute of limitations "is read into every statute of limitations."

In even further encouragement and protection to antitrust plaintiffs, the courts have held that the institution of successive governmental actions under § 5(b), if filed while the statute is still tolled, continues the tolling process beyond the conclusion of prior government actions.[14] Moreover, the statute is not only tolled as to the defendants named in the government's actions, but it is also tolled as to all co-conspirators whether named in the actions or not,[15] and it remains tolled as to *all* conspirators even if some have settled out or otherwise concluded their case with the government.[16] All of these expanding constructions of the statute of limitations have been made within the context of the antitrust acts themselves.

In the instant case, the fraudulent concealment factors allegedly present, coupled with successive governmental actions and delayed settlement of the govern-

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[13]Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946); Esplin v. Hirschi, 402 F.2d 94, 103 (10 Cir. 1968); Public Service Co. of New Mexico v. General Electric Co., 315 F.2d 306, 311 (10 Cir. 1963).

[14]*Maricopa, supra,* 303 F.Supp. at 86.

[15]Leh v. General Petroleum Corporation, 382 U.S. 54, 86 S. Ct. 203, 15 L.Ed.2d 134 (1965); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 354 (3 Cir. 1964), aff'd 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965).

[16]Maricopa, *supra,* 303 F.Supp. at 87.

ment suits by only one of the present defendants has carried back the period of defendants' potential liability to at least 1954 and tolled the statute for over six years following the government indictments of March 1964. If "the sole reason for [these tolling provisions] of the Clayton Act was to stimulate private antitrust suits * * * and aid such private suitors",[17] it would appear that this court has completely implemented congressional intent in these "Western Pipe" cases.

The policy behind the federal enactment of an antitrust statute of limitations with an accompanying statute on tolling was declared by Congress as follows:

> "This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.
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> "There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his

[17] *New Jersey Wood Finishing*, n. 15, 332 F.2d at 354.

complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. *This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.*

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will *tend to shorten the period* over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plain-

tiff's action had been suspended by the pendency of a Government antitrust proceeding, he *would be required to bring his action* either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued." (Emphasis added.)[18]

"*In addition to establishing a uniform statute of limitations,* the bill strikes at *another* problem flowing therefrom, namely, the tolling of such a statute. At the present time, the tolling of the statute, with respect to private treble damage suits, exists during the pendency of a suit by the United States. This period is continued by the present bill. However, in order that a person might not be deprived of the benefit of the Government suit because of an abrupt termination of the Government's litigation, the bill provides for extension of the tolling period not only for the duration of the Government suit but also for 1 year thereafter. Thus the injured parties are provided with an adequate time in which to take advantage of the Government's antitrust proceedings.

"*There is an added precaution also provided for* in this bill to prevent undue and lengthy prolongation of stale claims. By requiring a plaintiff to institute his suit either within 4 years from the date of injury or within 1 year after the final decree in a Government case, the plaintiffs will not be afforded time to procrastinate and delay." (Emphasis added.)[19]

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[18]S.Rep. No. 619, 6/21/1955 [To accompany H.R. 4954], 2 U.S. Cong. & Admin. News 1955, pp. 2332-2333.

[19]101 Cong.Rec. Part 4, p. 5130, 84th Cong. 1st Sess., Congressman Keating, House Committee on the Judiciary.

This court has previously said that when Congress enacted 15 U.S.C. § 16(b) tolling the 4-year statute of limitations of § 4B, it made it "manifest that in encouraging the enforcement of the antitrust laws by private litigation, tolling of the statute was more important than the repose established thereby."[20] That statement may be utilized only within the context of the interpretation of the extent of tolling permitted by 15 U.S.C. § 16(b), not as an inference of the application of Rule 23 to that section.

Any "interest-balancing" approach is inapplicable in this antitrust action if either the statutory bar of § 4B (15 U.S.C. § 15b) or § 5(b) (15 U.S.C. § 16(b)) created a substantive right for antitrust defendants. This problem of rights created by statute, which gives the right of action and also fixes the time within which such action may be brought, was fully considered by Chief Justice Waite in The Harrisburg, 119 U.S. 199, 214, 7 S.Ct. 140, 147, 30 L.Ed. 358 (1886), where, in determining if a suit *in rem* could be brought in admiralty under a state statute permitting recovery of damages for wrongful death on navigable waters which also fixed the time within which such action might be brought, wrote:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the

[20] *Maricopa, supra,* 303 F.Supp. at 85.

right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

This same rule was invoked in Ragan v. Merchants Transfer Co., 337 U.S. 530, 533, 69 S.Ct. 1233, 1235, 93 L.Ed. 1520 (1949), where Justice Douglas said of a state law and its statute of limitations vis-a-vis Rules 3 and 4:

> "Since that cause of action is created by local law, the measure of it is to be found only in local law. * * * It accrues and comes to an end when local law so declares. * * *
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> "We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. * * *
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> "It is argued that the Kansas statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals * * * has held to the contrary." (Footnote omitted.)[21]

Judge Learned Hand in Bomar v. Keyes, 162 F.2d 136, 138, 140 (2 Cir. 1947), in also considering

[21]This court does not view Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), as disturbing the above statement of applicable law.

the statute of limitations in relation to Rules 3 and 4, covered the obverse:

> "We [here] have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. * * * and when a right is not so conditioned the statute of limitations is treated as going to the remedy."

If the analyses of Justices Waite and Douglas and Judge Learned Hand on the bar of limitations in the context of rights created by statute are valid, then within the purview of the § 5(b) at least, any enlargement of tolling of that statute by virtue of the Rules cannot rationally be categorized as procedural.

The substantive-procedural dichotomy does not present a completely new problem. It has been considered by other courts but in connection with the effect of the doctrine of fraudulent concealment on § 4B. *E.g.*, Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 282 (8 Cir. 1962); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2 Cir. 1962); Public Service Co. of New Mexico, *supra*, n. 13. Each court held that Holmberg, *supra*, 327 U.S. at 397, 66 S.Ct. at 585, 90 L.Ed. 743, reads the principle that fraudulent concealment of a cause of action tolls a statute of limitations "into every federal statute of limitation", and since Congress did not provide to the contrary by unambiguous language, the rule applied to § 4B.[22] This rule appears now to be too well settled for dispute.[23]

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[22]This court has not ignored the carefully prepared and documented opinion of Judge Mathes in the *Kansas City, Missouri* case. As indicated above, the problem presented to that court, however, was not within the context of enlarging the antitrust

(This footnote is continued on next page)

*Tolling of §§ 4 B and 5 (b) and the Enabling Acts*

By judicial equitable fiat, § 4B is tolled by fraudulent concealment. By the legislative ukase of § 5(b), it is further tolled by government suit. In the context of the facts of this case, plaintiff would have the tolling period specified by § 5(b) additionally tolled by virtue of the Rules of Civil Procedure.

The Enabling Acts (28 U.S.C. §§ 2072, 2074, civil and bankruptcy rules; and 18 U.S.C. § 3771, criminal rules) confer rule-making power to the Court only over procedure and not substance. The test, as stated in Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1940), is "whether a rule really regulates procedure, * * * the judicial process for enforcing rights or duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." If Congress had but enacted § 4B to take the place of the hodge-podge of state statutes of limitation and omitted § 5(b), the substantive-procedural rationale of *Kansas City, Missouri* would have more validity. When, however, with no state statutes or common law precedent before it, Congress in § 5(b) created new and specific tolling conditions and periods, and unequivocally "*Pro*-tionally toll § 5(b) via the Federal Rules of Civil

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tolling period of § 5(b) by virtue of the Federal Rules of Civil Procedure, but rather an enlargement of § 4B by virtue of equitable doctrine against fraudulent concealment. This court, however, finds the *entire* Congressmen Murray-Quigley discourse concluding without anything genuinely definitive having been *agreed* upon. This court, like Judge Moore in *Atlantic City Electric Co., supra,* 312 F.2d at 243-244, believes that Chairman Celler and the Committee reports more accurately state congressional definition and intent of both §§ 4B and 5(b).

[23]Atlantic City v. General Electric Co., supra, was a 6 to 1 *en banc* opinion.

*vided, however*", that when the statute of limitations was suspended thereunder, "any action * * * shall be forever barred unless commenced either [within the period of suspension or] within four years after the cause of action accrued", the validity of comparing state-federal statutes of limitation[24] within the milieu of substantive-procedural rights becomes questionable. In § 5(b) Congress not only created new rights for antitrust plaintiffs but also clearly created obverse rights for antitrust defendants.

It is not necessary for this court to determine whether or not the doctrine in *York*, *Hanna* and *Sibbach*, *supra*, would here control. From its legislative history this court can only conclude that in enacting §§ 4B and 5(b) together with a unique tolling statute, Congress enmeshed into the Clayton Act its own statute of limitations applicable only to equally unique antitrust causes of action and calculated to give what Congress said was sufficient time for any aggrieved parties to discover violations, gain all the benefits they could from federal actions thereon, and file their own complaints. Specifically tailored as they were for antitrust litigation, this court cannot but determine that § 5(b) certainly, and § 4B rationally, were intended by Congress to become an integral part of the entire antitrust legislative scheme.

It thus appears to this court that the only statutory "right" given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F.R.Civ. P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to addi-

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[24] *Kansas City, Missouri, supra*, 310 F.2d at 282.

tionally toll: §5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right.

As the Court stated in Holmberg v. Armbrecht,[25] *supra:* "Traditionally and for good reasons, statutes of limitation are not controlling measures of *equitable* relief", and "a suit in *equity* may lie though a comparable cause of action at law would be barred." (Emphasis added.) That same Court also said: "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."[26]

This is not an equitable action nor do any equities appear for any petitioners. As stated above, all have regularly retained counsel. The attorneys for the "relying seven" are, presumably, no country squires, but rather, sophisticated "big city" counsel, under constant retainer as such by moneyed clients. Nothing appears in any of their affidavits to indicate why they should have "relied" on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that Utah's attorneys planned to file a class action.

This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended.

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[25]327 U.S. at 396, 66 S.Ct. at 584.

[26]327 U.S. at 395, 66 S.Ct. at 584.

The above conclusion carries even more thrust here, where this court has determined that the action may not be maintained as a class action. The class action, in the words of the Committee,[27] has been "stripped of its character as a class action." Since there never was a class, the members of the "class" cannot claim that they started their suits, vicariously, before the tolling period expired. There being no class, there is no connecting link available, even for the "relying seven", for attachment of any "relation back" hook.

Leave to intervene, with relation back of their actions to May 13, 1969, is therefore DENIED to *all* 60-odd intervenors-petitioners.

*(2) Motion for Leave to Amend and Add Co-parties Plaintiff*

The object of Utah's alternative (2) motion for leave to amend and add intervenors as co-parties plaintiff under Rule 15, too, is to get the intervenors' (as additional parties) complaints related back to May 13, 1969, and "under the portcullis." While Rule 15(c) permits an amendment changing a party *against* whom a claim is asserted, under certain circumstances, to relate back—if the statute has not run, the Advisory Committee Notes of 1966 state:

> "The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[28]

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[27]Committee on Rules of Practice and Procedure.

[28]3 Moore's Fed.Practice 15.01[9], p. 811.

A new party-plaintiff cannot be added by amendment after the statute has run.[29] This motion too must be denied.

*(3) Motion to Reinstate Class Action*

Utah's alternative motion (3) is that this court alter its order of December 4, 1969, under Rule 23(c) (1), F.R.Civ.P., to reinstate a class action, just for the present petitioners. Nothing contained in Utah's moving papers adds any new element or basis upon or from which this court would feel itself either impelled or compelled to change either its findings, conclusions or decision of December 4. The fact that the states of Wyoming, Idaho and Nevada and the public bodies therein who have purchased pipe during the relevant years of the "Western Pipe Conspiracy" appear in this alternative motion to have been abandoned by Utah, also in no wise changes any basis of this court's December 4, 1969 decision. This third alternative is likewise DENIED.

*(4) Motion to Vacate Court's Non-Class Order and Permit Intervention Relating Back*

Utah's alternative motion (4) is that the court vacate its December 4 order of non-class suit, direct that notice be given to the some 800 "class members" of this court's decision of "non-class action" and permit those who want to, to intervene within a reasonable time, with their intervention relating back to May 13, 1969. While Utah urges that "Fairness and due process re-

[29]Iocono v. Anastasio, 79 F.Supp. 378 (S.D.N.Y. 1948); Aarhus Oliefabrik A/S v. A. O. Smith Corp., 22 F.R.D. 33 (E.D.Wis. 1958); Murfkan v. Kahn, 11 F.R.D. 520 (S.D.Fla. 1951); Messelt v. Security Storage Co., 14 F.R.D. 507 (D.Del. 1953); Kerner v. Rackmill, 111 F.Supp. 150 (M.D.Pa. 1953).

quire that at the very least the class members be given notice of the court's decision and a reasonable opportunity to join in this action",[30] Utah bypasses the fact that defendants as well as plaintiff have equal rights to "fairness and due process." This court has already determined the due process aspects of the case. Leaden procrastination and delay in filing their own complaints on the part of "class members" may not here, *ipso facto,* be transmuted into golden participation by the emotional wand of "fairness". This motion is but another attempt to evade the statutory bar. Unfortunately for plaintiff, for the reasons heretofore set forth it too fails, and the motion is DENIED.

*(5) Motion for Certification for Interlocutory Appeal*

As a last motion (5), Utah asks that this court's order of December 4, 1969, be certified for interlocutory appeal.

This court is not prepared so to act, at this time at least. It did not in December last, nor does it now feel, that on the facts before it there is any substantial ground for a difference of opinion as to how this antitrust case should be treated or handled. Utah, having filed its claim in time, will have its day in court. All governmental bodies in the alleged "class" who may feel themselves injured by any alleged "Western Pipe" conspirators, have had over six years within which to seek redress, jointly or severally. Each has at all times been represented by counsel; many of the cities and water and sewer districts have operating budgets in the 7 to 9 figure dollar bracket. All are—or should be —sophisticated in both competitive bidding practices as

[30]Plaintiff's Memorandum in Support of Motions, p. 15.

well as litigation. No "creditors' bill" situations are here involved. All of those factors as well as more went into and compelled this court's decision of December 4, 1969.

The motion must be DENIED.

As the pleadings now stand, since petitioners have *alleged* a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases. If, however, petitioners' claims were limited to pre-December 12, 1964 transactions, different legal aspects would arise.

Defendants will prepare the necessary order.

## APPENDIX "D".

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

On Appeal from the United States District Court for the Central District of California.

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge*

MERRILL, Circuit Judge:

Weber Basin Water Conservancy District and other applicants for intervention have taken this appeal from a final order[1] of the District Court denying their applications to intervene in the action below brought by the State of Utah.

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*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

[1]Initially, the decision of the court below, reported in 50 F.R.D. 99 (1970), did not present an appealable final order. Applicants had alleged a cause of action including the four years prior to December 12, 1969, the date when the motions to intervene were filed, and as to those allegations, the statute of limitations had not run. 50 F.R.D. at 110. Applicants subsequently amended their complaint to eliminate allegations of conspiracy less than four years before the filing of the motion to intervene, thereby permitting a final order denying intervention to be filed.

That action was brought May 13, 1969,[2] as a class action against appellees, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages with respect to purchases of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants * * *." The action relied upon the same conspiracies involved in protracted litigation popularly known as the West Coast Pipe Cases, growing out of five criminal and five civil actions initiated by the Government in 1964 and ultimately terminated May 24, 1968.

On December 4, 1969, on motion of appellees, the court entered an order that the action shall "not be maintained as a class action"; that the class action "in all respects stands terminated as of May 13, 1969, the date of the filing of the complaint herein." The order was based on findings made under Rule 23, Federal Rules of Civil Procedure,[3] that members of the class

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[2]Action was brought in the District Court of the District of Utah. On July 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the case from the District of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, who had been actively involved as judge in the West Coast Pipe Cases (see text, *infra*).

[3]"(*a*) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(*b*) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(B)(3) the court finds that the questions of law or fact common to the members of the class predominate over any ques-

described in the complaint are "not so numerous that joinder of all such entities is impractical"; and that experience in the West Coast Pipe Cases had demonstrated that a class action was "inferior to other available methods for the fair and efficient adjudication of the instant controversy."[4]

Eight days later, on December 12, 1969, appellants filed motions to intervene as plaintiffs, as of right, under Rule 24(a)(2), or by permission, under Rule 24(b)(2). On March 30, 1970, the court handed down a decision denying intervention,[5] which was followed by formal findings of fact, conclusions of law, and order, from which order this appeal is taken.

We agree with the District Court that appellants had no right to intervention under Rule 24(a) since, as a practical matter, they would not be affected by any potential recovery by Utah. Fed.R.Civ.P. 24(a)(2).

However, denial of appellants' motion for permissive intervention under Rule 24(b) was, in our judgment, erroneous.

The court felt that the limitations of §5(b) of the Clayton Act, 15 U.S.C. §16(b), barred appellants from assertion of their claims. That section suspends the running of the statute of limitations against private Clayton Act suits during the pendency of suits initiated by the Government (based on the same viola-

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tions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[4]The order was supported by decision filed December 17, 1969, *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969).

[5]*Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

tions) and for one year thereafter.[6] The section then emphasizes the converse:

> "*Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

In this case §5(b) served to suspend limitations for one year from May 24, 1968 (termination of the Government suits), and ran (or would have run) against these appellants May 24, 1969. The section requires that an action be "commenced * * * within the period of suspension * * *." Rule 3, Fed.R.Civ.P., provides that "A civil matter is commenced by filing a complaint with the court." This suit, as we have noted, was commenced by Utah eleven days before the running of the statute. If the action had proceeded as a class action, we have no doubt that appellants' claims would satisfy §5(b).[7]

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[6] "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part of any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter * * *."

[7] Even before Rule 23 was amended in 1966, most courts held that even as to "spurious" class actions, a plaintiff could intervene after the timely filing of a class action without independently satisfying the applicable statute of limitations. *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*,

The District Court read §5(b) as not only granting a tolling period but as warning that further delay was not to be tolerated. The court stated in its decision:

> "This court can but conclude that within the statutorily created antitrust universe §5(b) cannot be re-tolled by any [Federal] Rule [of Civil Procedure] to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of §5(b) has ended." 50 F.R.D. at 108.

We cannot agree. Appellants sought only to present to the court in the very form the court had indicated it preferred the very claims already tendered to the court on their behalf by Utah.

Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact

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371 U.S. 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). *Contra, Pennsylvania Co. for Insurances v. Deckert*, 123 F.2d 979 (3d Cir. 1941). The objection to the majority rule was that it encouraged "one-way intervention"; it allowed a prospective plaintiff to sit on the side lines, await the outcome of the suit, and then if the class action was successful, intervene and collect. If the action was unsuccessful, and a potential class member had not intervened, he was not bound. This gap was corrected in 1966 and Rule 23 now provides that all class members are bound by the judgment unless they elect not to be included as class members. The strongest argument against the majority position having been eliminated, where a class action is maintained, intervention must be allowed without independent satisfaction of a statute of limitations. *See Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Penn. 1968).

respecting the underlying conspiracy); not for lack of standing of the representative,[8] or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.

Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits.[9] The requirements of §5(b) were then met.

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[8]*See, e.g., Hobbs v. Police Jury of Morehouse Parish,* 49 F.R.D. 176 (W.D. La. 1970) (per curiam).

[9]One of the grounds stated in the order denying maintenance of class action was taken from Rule 23(a)(1) relating to the right to sue:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable."

It is argued that this deprives the plaintiff of any power to tender class claims where joinder is practicable, and thus that it cannot be said that the claims of class members had been tendered or were before the court at all.

We cannot accept this reasoning. There may well be a case where the class is so limited in number that practicability of joinder appears as matter of law. This case, however, would appear to be one where ascertainment of practicability was in exercise of judicial discretion. The rule did not preclude the court from entertaining suit as a matter of law; rather, the court declined to entertain it by exercise of its discretion. This being so, it must follow that in so far as §5(b) is concerned the class was before the court until its exercise of discretion. To hold otherwise would be to empower the court, through the discretionary determination of whether suit had been commenced or not, to render the statute of limitations applicable or not, as it sees fit. Considerations of order and certainty dictate that such questions should be resolved by rule of law rather than exercise of discretion.

Suit having been commenced by a filing of the complaint, members of the class were safely in court and their claims protected against the bar of §5(b) until, by order of the court, they were ejected from the suit. The statute thus was tolled by commencement of suit and did not again commence to run until entry of the order denying class action.

This being so, it did not lie within the discretionary province of the District Court to deprive them of the eleven days balance of time remaining to them under §5(b). If the order, through legal fiction, is to project itself backward in time it must fictionally carry backward with it the class members to whom it was directed, and the rights they presently possessed. It cannot leave them temporally stranded in the present.

We conclude that it was error for the court to hold that appellants' petitions for intervention were barred by §5(b).

The order of the District Court is affirmed as to intervention under Rule 24(a). As to intervention under Rule 24(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions. Costs are awarded to appellants.

State of Utah v. American Pipe & Construction Co., et al, Nos. 26542 and 26543.

KILKENNY, Dissenting:

I believe the trial judge exercised a legal discretion and that the appellants, on the record before us, have not shown an abuse of his appraisal of the issues presented on the applications for intervention. I would affirm on the basis of the trial judge's decision. *State of Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

## APPENDIX "E".

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees. Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

[December 11, 1972].

On Appeal from the United States District Court for the Central District of California.

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge.*

MERRILL, Circuit Judge:

Weber Basin Water Conservancy District and other applicants for intervention have taken this appeal from a final order[1] of the District Court denying their appli-

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*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

[1]Initially, the decision of the court below, reported in 50 F.R.D. 99 (1970), did not present an appealable final order. Applicants had alleged a cause of action including the four years prior to December 12, 1969, the date when the motions to intervene were filed, and as to those allegations, the statute of limitation had not run. 50 F.R.D. at 110. Applicants subsequently amended their complaint to eliminate allegations of conspiracy less than four years before the filing of the motion to intervene, thereby permitting a final order denying intervention to be filed.

cations to intervene in the action below brought by the State of Utah.

That action was brought May 13, 1969,[2] as a class action against appellees, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages with respect to purchase of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants * * *." The action relied upon the same conspiracies involved in protracted litigation popularly known as the West Coast Pipe Cases, growing out of five criminal and five civil actions initiated by the Government in 1964 and ultimately terminated May 24, 1968.

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[3]"*(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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described in the complaint are "not so numerous that joinder of all such entities is impracticable"; and that experience in the West Coast Pipe Cases had demonstrated that a class action was "inferior to other available methods for the fair and efficient adjudication of the instant controversy."[4]

Eight days later, on December 12, 1969, appellants filed motions to intervene as plaintiffs, as of right, under Rule 24(a)(2), or by permission, under Rule 24(b)(2). On March 30, 1970, the court handed down a decision denying intervention,[5] which was followed by formal findings of fact, conclusions of law, and order, from which order this appeal is taken.

We agree with the District Court that appellants had no right to intervention under Rule 24(a) since, as a practical matter, they would not be affected by any potential recovery by Utah. Fed.R.Civ.P. 24(a)(2).

However, denial of appellants' motion for permissive intervention under Rule 24(b) was, in our judgment, erroneous.

The court felt that the limitations of §5(b) of the Clayton Act, 15 U.S.C. §16(b), barred appellants from assertion of their claims. That section suspends the run-

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*(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(B)(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[4]The order was supported by decision filed December 17, 1969, *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17, 21 (C.D.Cal. 1969).

[5]*Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

ning of the statute of limitations against private Clayton Act suits during the pendency of suits initiated by the Government (based on the same violations) and for one year thereafter.[6] The section then emphasized the converse:

> "*Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

In this case §5(b) served to suspend limitations for one year from May 24, 1968 (termination of the Government suits), and ran (or would have run) against these appellants May 24, 1969. The section requires that an action be "commenced * * * within the period of suspension * * *." Rule 3, Fed.R.Civ.P., provides that "A civil matter is commenced by filing a complaint with the court." This suit, as we have noted, was commenced by Utah eleven days before the running of the statute. If the action had proceeded as a class action, we have no doubt that appellants' claims would satisfy §5(b).[7]

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[6] "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter * * *."

[7] Even before Rule 23 was amended in 1966, most courts held that even as to "spurious" class actions, a plaintiff could intervent after the timely filing of a class action without independently

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The District Court read §5(b) as not only granting a tolling period but as warning that further delay was not to be tolerated. The court stated in its decision:

> "This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any [Federal] Rule [of Civil Procedure] to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended." 50 F.R.D. at 108.

We do not regard what appellants sought by intervention as a "retolling" of the statute. Rather, they sought to present to the court in the very form the court had indicated it preferred the very claims already tendered to the court on their behalf by Utah.

Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf

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satisfying the applicable statute of limitations. *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). *Contra, Pennsylvania Co. for Insurance v. Deckert*, 123 F.2d 979 (3d Cir. 1941). The objection to the majority rule was that it encouraged "one-way intervention"; it allowed a prospective plaintiff to sit on the side lines, await the outcome of the suit, and then if the class action was successful, intervene and collect. If the action was unsuccessful, and a potential class member had not intervened, he was not bound. This gap was corrected in 1966 and Rule 23 now provides that all class members are bound by the judgment unless they elect not to be included as class members. The strongest argument against the majority position having been eliminated, where a class action is maintained, intervention must be allowed without independent satisfaction of a statute of limitations. *See Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Penn. 1968).

of the members of the class; (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy) not for lack of standing of the representative,[8] or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.

Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requireents of §5(b) were then met.

This being so, it did not lie within the discretionary province of the court to dismiss those claims out of hand. By subjecting them to the bar of the statute, the court did just that.

As stated in Wright and Miller, Federal Practice and Procedure (1922) §1786:

> "The court should be particularly sensitive to potential statute of limitations problems whenever a negative determination as to maintenance of a class action is made."

To prevent the creation of prejudice in this respect, denial of class action should in this case have been given the same unprejudicial effect as the dismissal of a complaint with leave to amend; opportunity should have

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[8]*See, e.g., Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176 (W.D. La. 1970) (per curiam).

been afforded to accomplish the procedural alternatives which the District Court itself suggested and which were the sole basis for denial of class action.

Apparently the court was moved to relate back the denial of class action because of a belief that appellants had failed to show justifiable reliance on Utah's suit in their behalf. The court based its conclusions in this respect on the fact that the members of the class, having knowledge of their claims and ample notice of proceedings in the West Coast Pipe Cases, could well have acted in their own behalf and need not have looked to Utah as their representative.

This, in our judgment, was not a proper standard for a determination of lack of reliance.[9] The question, rather, was whether the applicants for intervention had forborne to sue in their own behalf because of a justifiable belief that they were before the court in Utah's suit. To apply the court's standard seems unreasonably to discourage reliance on class actions.

Where a member of the class is dissatisfied with the repesentation it affords him, he can be expected to intervene in his own behalf. However, if satisified with the representation the suit affords, we perceive no sound reason at all for discouraging him from relying on it pending determination as to maintenance. Interests of judicial administration and the conservation of judicial time would seem to dictate that he should be encouraged not to complicate or enlarge the litigation unnecessarily by insisting that his own claim be given individual attention throughout the entire proceedings and not to

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[9]We assume, without deciding, that reliance is a relevant consideration and that relation back of a denial of class action because of lack of reliance is a course open to the court.

burden the courts unnecessarily by filing a parallel action.[10]

In this case the record persuasively indicates forebearance of suit as to all appellants. Some of them had actual knowledge that Utah was suing in their behalf. As to the others, Utah felt morally responsible to protect their interests and presented evidence that with foreknowledge of the court's views it would promptly have advised suit just as it ultimately advised that intervention be sought. Considering the promptness with which action was taken at that time, the record indicates that had denial of class action been ordered immediately after commencement of the suit, motions to intervene by all appellants would have been timely filed eight days later and three days prior to the running of the statute.

We conclude that it was error to relate the denial of class action back to commencement of suit. Accordingly, it was error to rule on motion for intervention that intervention was barred by §5(b).

The order of the District Court is affirmed as to intervention under Rule 23(a). As to intervention under Rule 23(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions. Costs are awarded to appellants.

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[10]The District Court itself has taken note of these considerations. In denying intervention it held that the resulting complications would prejudice the defendants.

> "[To] permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case." 50 F.R.D. at 102.

KILKENNY, Dissenting:

I believe the trial judge exercised a legal discretion and that the appellants, on the record before us, have not shown an abuse of his appraisal of the issues presented on the applications for intervention. I would affirm on the basis of the trial judge's decision. *State of Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

## APPENDIX "F".

1. United States Code, Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. United States Code, Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282):

"Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit."

3. United States Code, Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283):

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

4. United States Code, Title 15, Section 16(b) (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

5. Rule 3, Federal Rules of Civil Procedure:

"COMMENCEMENT OF ACTION

A civil action is commenced by filing a complaint with the court."

6. Rule 23 (a), (b), and (c), Federal Rules of Civil Procedure:

"CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all mem-

bers is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient

adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall

include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

7. Rule 24(b), Federal Rules of Civil Procedure:

"(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

## APPENDIX "G."

**Statutory Limitation Periods Which Apply to Various Private Rights of Action Arising Out of or Provided for in Federal Regulatory Statutes.**

1. 45 U.S.C. §153(r)

Establishes two year limitation period for suits challenging the awards made by the National Railroad Adjustment Board in disputes between employees and carriers.

2. 15 U.S.C. §1640(e)

One year statute for civil action brought pursuant to Truth in Lending Act.

3. 29 U.S.C. §630(d) (Age discrimination in employment)

One hundred eighty day period in which person aggrieved must file notification of intent to file action with Secretary of Labor in order to preserve right (in case Secretary fails to take action) to seek relief in civil action brought in court of competent jurisdiction. [Alternative three hundred day period established if state anti-discrimination procedures to be invoked pursuant to §633(b)].

4. 7 U.S.C. §2305(c)

Applies to actions based on injuries due to unfair trade practices in production of agricultural products. Limited to two years after the cause of action accrued.

5. 15 U.S.C. §1223

Action by automobile franchisee against manufacturer for failure to carry out terms of agreement in good faith. Three year limitations period.

6. 49 U.S.C. §3(3)

Action by carrier against shipper-consignee or against party to whom delivery is made pursuant to directions of shipper-consignee for carrier's charges to be brought within two years of accrual of cause of action or within six months of final judgment against the carrier in an action against either of such parties begun within two year limitation period.

7. 49 U.S.C. §16(3)(a) and (b)

Actions by or against carriers subject to Interstate Commerce Act for charges to be brought within two years of accrual of cause of action. Accrual begins on delivery or tender of delivery [Various extensions provided if particular steps taken by either party—§16(3)-(c) and (d)].

8. 49 U.S.C. §3(2)

Action against reconsignor or diverter for giving erroneous information as to beneficial owner to carrier or action against consignor or shipper if information given by reconsignor is correct is subject to same limitation periods as are described in 49 U.S.C. §3(3).

9. 49 U.S.C. §908

This section is a part of the chapter of the Interstate Commerce Act dealing with water carriers. It establishes a system of limitation periods applicable to various private claims which may be brought against carriers who violate the provisions of the chapter.

10. 49 U.S.C. §918

Establishes limitation periods for collection of rates and charges by carriers subject to the water carrier provisions of the Interstate Commerce Act.

11. 49 U.S.C. §1006(a).

Establishes system of limitation periods with respect to recovery of charges, overcharges and reparations from or by freight forwarders under the provisions of the Interstate Commerce Act relating to the rights and obligations of freight forwarders.

12. 49 U.S.C. §304(a)

Establishes limitation periods with respect to actions involving motor carriers arising pursuant to the chapter on Motor Carriers of the Interstate Commerce Act.

13. 15 U.S.C. §1681(p)

Establishes limitation period for actions brought by consumers against consumer credit reporting agencies who fail to comply with requirements of Consumer Credit Protection Act.

14. 46 U.S.C. §763

Establishes limitation period for suits brought under the chapter of the Shipping Statutes dealing with Death on the High Seas by Wrongful Act.

15. 43 U.S.C. §699

Establishes limitation period for suits brought by purchaser of land from person who originally purchased such land at public auction where agreement of sale to second purchaser violated §696 of the Title.

16. 45 U.S.C. §56

Establishes limitation period for actions brought against common carriers (railroads) by their employees pursuant to the statutory provisions providing therefor of the Federal Employer's Liability Act.

17. 42 U.S.C. §4053

Establishes limitation period for claims against insurers participating in the National Flood Insurance Program.

18. 15 U.S.C. §1711

Establishes limitation period for suits brought against sellers of land in interstate commerce for recovery of damages as a result of acts of sellers which violate provisions of Interstate Land Sales Act.

19. 29 U.S.C. §255

Provides limitation periods for various private causes of action arising under the Fair Labor Standards Act of 1938, the Walsh-Healey Act and the Bacon-Davis Act.

20. 35 U.S.C. §286

Establishes general limitation periods for actions for damages resulting from patent infringements.

21. 12 U.S.C. §86

Establishes limitation period in which action to recover usurious interest charged by national bank must be brought.

22. 15 U.S.C. §1400(b)

Establishes limitation period in which distributor or dealer may commence action against manufacturer or distributor to recover damages sustained as a result of failure of said manufacturer or distributor to comply with repurchase requirements of Traffic and Motor Vehicle Safety Act.

23. 47 U.S.C. §415

Establishes limitation period for claims for charges or refund of overcharges brought by or against carriers

engaged in interstate communications activities subject to the regulation of the F.C.C.

24. 7 U.S.C. §499(g)

Establishes limitation period in which action must be commenced against agricultural dealer or broker who fails to pay reparation award ordered by Secretary of Agriculture under Perishable Agricultural Commodities Act.

25. 46 U.S.C. §730

Establishes limitation period in which action must be commenced to recover remuneration for rendering assistance or salvage service to a vessel within jurisdiction of the United States.

26. 12 U.S.C. §1977

Establishes limitation period for commencement of actions against banks (and related organizations) which may be brought pursuant to Chapter 22, "Tying Arrangements" of Title 12 (*Banks and Banking*).